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AGENDA
BOARD OF ENVIRONMENTAL REVIEW
FRIDAY, JUNE 3, 2005
METCALF BUILDING, CONFERENCE ROOM 111
1520 EAST SIXTH AVENUE, HELENA, MONTANA

NOTE: Individual agenda items are not assigned specific times. For public notice purposes, the Board will begin the meeting at the time specified. However, the Board might not address the specific agenda items in the order they are scheduled.

9:00 A.M.

I. ADMINISTRATIVE AGENDA ITEMS

A. Review and approve minutes of April 1, 2005, meeting.

[Draft Minutes](#)

B. Review and approve minutes of May 3, 2005, teleconference meeting.

[Draft Teleconference Minutes](#)

II. BRIEFING AGENDA ITEMS

A. CONTESTED CASE UPDATE:

1. Cases assigned to Hearing Officer Tom Bowe

- a. **In the matter of CR Kendall Corporation's request for a hearing to appeal DEQ's decision to deny a minor permit amendment under the Metal Mine Reclamation Act (BER 2002-09 MM).** CR Kendall and DEQ have jointly requested additional time to submit a proposed schedule. Hearing Examiner Tom Bowe has granted the requests.
- b. **In the matter of the Petition for Review of Hazardous Waste Final Permit No. MTHWP-03-01 issued to Flying J Petroleums, Inc. (BER 2003-14 HW).** Flying J has requested a hearing under the Montana Hazardous Waste Act to review the final decision of DEQ to issue a Hazardous Waste Final Permit to Flying J for its former refinery located near Cut Bank. Counsel for the parties stipulated to a stay of contested case proceedings while they discussed the terms of an order that could resolve this case. However, the case was not settled and the parties proposed a schedule for contested case proceedings. On April 5, 2005, Hearing Examiner Tom Bowe issued a scheduling order. The final prehearing conference was set for January 10, 2006.
- c. **In the matter of Violations of the Montana Water Quality Act by the City of Lewistown Wastewater Treatment Plant (BER 2004-15 WQ).** On October 20, 2004, the Board received a letter from the City Manager of Lewistown appealing \$11,608 in administrative penalties for violations of the Water Quality Act. On September 21, 2004, DEQ had issued an Administrative Penalty Order for six discharges of sewage into Big Spring Creek. The parties proposed a schedule for contested case proceedings on March 1, 2005, and

Hearing Examiner Tom Bowe issued a scheduling order. The hearing will probably occur in late October or November 2005.

- d. **In the matter of the request for hearing of Nature View Estates, Missoula County, under Mont. Code Ann. § 76-4-126 (BER 2004-16 SUB).** On November 3, 2004, the Board received a letter from the law firm representing the subdivision applicants, Jeff and Kori Hollenback. By letter dated October 4, 2004, the Missoula City-County Health Department stated that the subdivision couldn't be approved because of water supply deficiencies. At the request of the parties, Hearing Examiner Tom Bowe set March 3, 2005, as the deadline to settle the case or to submit a schedule for contested case proceedings. The parties proposed a schedule and Bowe issued a scheduling order. The hearing is scheduled to begin on August 25, 2005.
- e. **In the matter of Violation of the Montana Strip and Underground Mine Reclamation Act by Westmoreland Resources, Inc. at the Absaloka Mine, Big Horn County (BER 2005-01 SM).** Request for hearing was received on January 3, 2005, on a Notice of Violation and Statement of Proposed Penalty dated December 13, 2004. The Department contends that Westmoreland (WRI) failed to regrade to the approved postmining topography and assessed a penalty of \$800 for the violation. By letter dated January 31, 2005, DEQ gave notice to the Crow Coal Regulatory Program of the case. The Tribe did not file a motion to intervene. The parties have stipulated to suspension of the abatement order as long as there is no immediate danger to health or safety. A prehearing conference was conducted on May 18, 2005, and the parties requested more time to attempt to reach a settlement. Hearing Examiner Tom Bowe granted the request and set June 15, 2005, as the date for a prehearing conference if the case has not settled by then.
- f. **In the matter of Violations of the Montana Public Water Supply Laws by Darwin Simac d/b/a Jackson Creek Saloon, Montana City, Jefferson County (BER 2005-05 PWS).** The Board received a request for hearing on January 31, 2005, regarding a Notice of Violation and Administrative Compliance and Penalty Order for various violations of the Montana Public Water Supply Laws. The parties agreed on a schedule. Hearing Examiner Tom Bowe issued a scheduling order with the hearing set to begin on August 23, 2005.
- g. **In the Matter of Violations of the Montana Water Quality Act by Bar S Livestock, Inc., Toole County, Montana (BER-2005-06 WQ).** Bar S Livestock, Inc. requested a hearing on the Notice of Violation and Administrative Compliance and Penalty Order issued by DEQ relating to the alleged failure of Bar S Livestock, Inc. to comply with the requirements of the general permit for the CAFO it operates near Shelby. The parties agreed on a schedule. Hearing Examiner Tom Bowe issued a scheduling order with the hearing set to begin on October 5, 2005.

B. OTHER BRIEFING ITEMS

- 1. Upper Blackfoot Mining Complex Brief

III. ACTION AGENDA ITEMS

A. REPEAL, AMENDMENT OR ADOPTION OF FINAL RULES:

1. Amend rules at ARM 17.8.102, 17.8.103, 17.8.202, 17.8.302, 17.8.602, 17.8.767, 17.8.802, 17.8.902, 17.8.1002, 17.8.1102, 17.8.1202, 17.8.1302, 17.8.1305, 17.8.1310, 17.8.1402, and 17.8.1502 pertaining to incorporation by reference of current federal regulations and other materials into air quality rules. Presiding Officer Tom Bowe conducted the public hearing on March 23, 2005. The EPA provided written public comments. The Department has modified the proposed amendments based on the comments, and recommends adoption of the proposed amendments with the modifications.

[Executive Summary](#)

[Notice of Public Hearing on Proposed Amendment](#)

[Notice of Amendment](#)

2. Amend rules at ARM Title 17, Chapter 30, Subchapter 13 pertaining to concentrated animal feeding operations (CAFOs); adopt federal Effluent Limit Guidelines as promulgated in the Code of Federal Regulations Subchapter N, Part 412 (Effluent Limits and Standards); and adopt a new Department Circular DEQ9, which contains state technical standards for nutrient management, animal waste management system design, land application rates, and monitoring and reporting requirements as required in the revised federal regulation. A public hearing was conducted on January 14, 2005. Numerous comments were received from members of the public during the hearing and after the hearing. On February 28, 2005, the United States Court of Appeals for the Second Circuit issued a lengthy opinion about the federal CAFO rules. The Court vacated those portions of the federal rules that allow permitting authorities to issue permits without reviewing the terms of nutrient management plans, that allow authorities to issue permits that do not include the terms of the nutrient management plans and do not provide for adequate public participation, and that require large CAFOs to apply for permits based on a presumption that they are likely to have actual discharges, or otherwise demonstrate that they have no potential to discharge. The Court remanded other aspects of the federal rules to EPA for further clarification and analysis. The Department recommends that the Board either: (a) issue an amended notice to obtain a six-month extension of time for taking action in this matter, to allow time for EPA to clarify its rule in response to the court decision; or (b) take no action, in which case this rulemaking will expire and the Department will need to request, after EPA has clarified its rule, that the Board issue a new notice of proposed rulemaking to revise the state CAFO rules and adopt Circular DEQ 9.

[Executive Summary](#)

[Amended Notice of Proposed Amendment](#)

B. INITIATION OF RULEMAKING

The Department will propose that the Board concur in its recommendation to initiate rulemaking to:

1. Amend ARM 17.8.504, 17.8.505, and 17.8.514 for the annual adjustment of air quality operation and open burning fees, and to revise air quality permit application fees.

[Executive Summary](#)

[Notice of Public Hearing on Proposed Amendment](#)

C. THREE YEAR REVIEW OF TEMPORARY WATER QUALITY STANDARDS

The Board will conduct the three-year review of temporary water quality standards adopted for the New World Mining District. The Board adopted the TWQ Standards in June 1999 and

conducted a triennial review in July 2002. The implementation plan to restore Daisy Creek, Fisher Creek, and portions of the Stillwater River is being administered by the U.S. Forest Service. The triennial review is a public hearing required by Mont. Code Ann. § 75-5-312.

D. FINAL ACTION ON APPEALS:

1. **In the matter of MPDES General Permit No. MTR04000 for storm water discharge associated with Small Municipal Separate Storm Sewer System (MS4) (BER 2004-18 WQ).** The cities are Billings, Bozeman, Butte, Great Falls, Helena, Kalispell, and Missoula. The cities contend that DEQ has no authority to require the cities to perform storm water monitoring as part of the general permit. Both the cities and DEQ filed motions for summary judgment. Hearing examiner Tom Bowe heard arguments from the parties on April 5, 2005, and issued a decision on April 6, 2005, that recommends denying the Cities' motion for summary judgment and granting DEQ's motion. The cities filed exceptions to the proposed decision and DEQ filed responses to the cities' exceptions to the proposed decision. The parties will be given an opportunity to present oral arguments to the Board during the meeting. An order granting DEQ's motion for summary judgment and dismissing the contested case will be presented to the Board for approval. On May 18, 2005, the cities filed a reply to DEQ's response.
2. **In the Matter of Violations of the Montana Underground Storage Tank Act at Save-Rite South, and Save-Rite West, Libby (BER 2005-07 UST and BER 2005-08 UST).** Robert Uithof, the owner of the stations, appealed notices of violation, administrative penalty orders and orders to take corrective action. The parties have submitted a Stipulation for Dismissal. A proposed order will be submitted to the Board for approval.
3. **In the matter of the request for hearing of Lang Creek Brewery, Inc. (BER 2004-13 WQ).** Lang Creek Brewery requested a hearing on the Administrative Compliance and Penalty Order issued by DEQ relating to the alleged failure to submit a complete application and application fee after a permit for wastewater discharges expired, and failure to submit monitoring reports. The parties requested time to pursue informal settlement discussions. Hearing Examiner Tom Bowe issued an order granting the parties until May 24, 2005, to submit settlement papers or a schedule for contested case proceedings. On May 17, 2005, the parties filed a stipulation for dismissal. A proposed order will be submitted to the Board for approval.

E. NEW CONTESTED CASES

1. **In the matter of Violations of the Water Quality Act by ASARCO, Inc., (BER 2005-09 WQ).** The Board received a request for hearing regarding an Administrative Penalty Order issued by DEQ for the alleged failure to pay annual permit fees on the MGWPCS permit for discharges from the Paymaster Mine Adit located in Lewis and Clark County. DEQ claims ASARCO should have paid permit fees for a permit that ASARCO argues should have been terminated in 2002. Standing Interim Hearing Examiner Tom Bowe issues the First Prehearing Order on April 21, 2005. The Board may appoint a permanent hearing examiner or decide to hear the case.
2. **In the matter of Violations of the Opencut Mining Act by Kenneth Mikesell, d/b/a Mikesell Gravel Mine, Meagher County (BER 2005-10 OC).** DEQ issued a notice of violation, statement of proposed penalty, and cessation and abatement order. In 1980, a permit was issued for an opencut gravel mine that would disturb 4 acres. An inspection in 2002 found about 20 acres of surface had been disturbed. Despite repeated requests,

Mr. Mikesell did not submit an application to amend the permit and an additional bond, and was ordered to cease mining outside the 4-acre permitted area. Standing Interim Hearing Examiner Tom Bowe issued the First Prehearing Order on May 5, 2005. The Board may appoint a permanent hearing examiner or decide to hear the case.

3. **In the matter of the application by Patty Irvine, d/b/a Marks Environmental Service, for renewal of septage disposal license (BER 2005-11 SW).** DEQ denied license renewal by order dated March 29, 2005. The renewal was denied because the business is not being operated in compliance with septage disposal laws and rules. Alleged violations included the failure to maintain records, disposing of septage on land without first obtaining the written approval of the landowner and DEQ, and disposing of septage without a license. Standing Interim Hearing Examiner Tom Bowe issued the First Prehearing Order on May 5, 2005. The Board may appoint a permanent hearing examiner or decide to hear the case.
4. **In the matter of the notice of Violation of the Opencut Mining Act by Mickelson Rock Products, LLC at the Tricon Pit #2, Mineral County (BER 2005-12 OC).** DEQ issued a notice of violation and statement of proposed penalty for mining without a permit. Standing Interim Hearing Examiner Tom Bowe issued the First Prehearing Order on May 10, 2005. The Board may appoint a permanent hearing examiner or decide to hear the case.
5. **In the matter of Violations of the Montana Operator Certification and Public Water Supply Laws by Richard Kelly at the Ten Mile-Pleasant Valley Lagoons, Lewis and Clark County (BER 2005-13 PWS).** The Board received a request for hearing on May 17, 2005, regarding the Notice of Violation and Administrative Compliance and Penalty Order issued by DEQ for the operation of a public sewage system without a certified operator. The Board may appoint a permanent hearing examiner or decide to hear the case.

F. REMANDED CONTESTED CASE

In the matter of the issuance of the Air Quality Permit for the Roundup Power Project, Permit No. 3182-00 (BER 2003-04 AQ). On April 19, 2005, the Montana Supreme Court issued an opinion concluding that the Board, which conducted the contested case hearing on June 4-6, 2003, had not applied the correct standard of review. Additional information is provided in the memorandum with attachments included in the Board packets. If the case has been remanded to the Board by the date of the Board meeting, the Board may decide whether to make a new decision based on the record or to receive additional evidence. The Board may set a schedule for further proceedings.

On May 11, 2005, the Board received a motion to toll time to commence construction from Bull Mountain Development Company, with brief in support. Bull Mountain states that its permit requires it to begin construction by June 10, 2005. However, Bull Mountain contends that it is difficult to begin construction when the status of the permit is uncertain. On May 13, 2005, Hearing Examiner Tom Bowe issued an order setting May 25 as the deadline for filing briefs in response to Bull Mountain's motion. The Board will consider the motion at the meeting.

[Memorandum](#)

G. ADOPTION OF REVISED FAQs

The Board adopted FAQs (frequently asked questions, and answers) on July 26, 2002. The proposed revised FAQs, drafted by Tom Bowe, update the FAQs with various changes, including the following: adding or revising the list of statutes that allow requests for contested case hearings: Mont. Code Ann. Sections 75-5-516(8) & (10), 75-6-108(5), 75-10-

1221, 75-11-512, 75-11-525, 75-20-223; adding a concluding sentence to the answer to the third question after the Table; updating the Board's e-mail address; and revising the third paragraph of the answer of the third question regarding air quality permits. The Board will decide whether to adopt the proposed revised FAQs.

[Revised Frequently Asked Questions](#)

H. PETITION FOR RULEMAKING

On May 17, 2005, the Board received a 70-page petition from 17 entities, including Northern Plains Resource Council and Tongue & Yellowstone Irrigation District. The petition requests that the Board initiate rulemaking pertaining to wastewater from coal bed methane development. Under Mont. Code Ann. Sec. 2-4-315 and Model Rule 2 (ARM 1.3.205), the Board will hear presentations by the petitioners and other interested persons regarding whether the Board should deny the petition or initiate rulemaking.

[Executive Summary](#)

[Cover Letter](#)

[Petition for Rulemaking](#)

[Certificate of Service](#)

[List of Supplemental Exhibits](#)

IV. ADJOURNMENT

NOTE: Persons with disabilities who need an accommodation in order to participate in this meeting, should contact the Board Secretary at (406) 444-2544.